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No. 92-87

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

In re: KOREAG, CONTROLE et REVISION, S.A., as Official Liquidator of Mebco Bank, S.A. (In Liquidation) pursuant to the Insolvency Laws of the Federal Republic of Switzerland.

KOREAG, CONTROLE et REVISION, S.A.,

Petitioner,

v.

REFCO F/X ASSOCIATES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit was correct to (a) interpret Bankruptcy Code § 304(b)(2) in accordance with its plain language, as requiring a court first to determine an adverse party's good faith claim of ownership of property, because the plain language of § 304(b)(2) expressly limits the court's power to turnover property to a foreign representative of a foreign debtor's estate to "property *of* such estate," and (b) reject petitioner's attempt to rewrite § 304(b)(2), so as to avoid a determination of ownership, by replacing the turnover words, "property *of* such estate," with the words "property *involved in* such foreign proceeding," which appear in another subsection of the statute and set the standard for granting injunctive relief to the foreign representative.

2. Whether the Second Circuit correctly applied the well-established choice of law rules to the particular facts of this case, in holding that ownership of the specific property at issue here should be decided under New York law, rather than under Swiss Law.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Refco F/X Associates, Inc. ("Refco"), respectfully submits that the petition for a writ of *certiorari* to the Court of Appeals for the Second Circuit, filed by the foreign liquidator (the "Liquidator") of a defunct bank being liquidated in Switzerland ("Mebco"), should be denied.[1]

This case presents no issue requiring Supreme Court review. The Second Circuit's decision interpreting Bankruptcy Code § 304(b)(2), 11 U.S.C. (1988), ("§ 304(b)(2)") applied, and is consistent with, this Court's repeated pronouncements that unambiguous language of a statute is to be interpreted in accordance with its plain meaning. The Second Circuit also followed well-settled choice of law rules and, based on the subject property's location in New York and the parties' substantial activities in New York, concluded that New York has a greater interest in the property dispute here than does Switzerland. The Second Circuit's decision is consistent also with this Court's holdings that, whereas bankruptcy law defines a debtor's estate generically, other applicable law that governs individual property rights absent bankruptcy determines whether the debtor or an adverse claimant has a greater interest in the specific property at issue, so as to prevent a debtor from forum shopping or receiving a windfall merely by reason of the happenstance of bankruptcy.

The Second Circuit decision is not in conflict with any decision of another court of appeals on the same matter. Nor did the Second Circuit decide a federal question in a way that conflicts with a state court of last resort. Nor does this case involve an important question of federal law which should be settled by this Court. The Second Circuit's decision is likely to have limited impact because it will affect few potential litigants.

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[1] Refco has no subsidiary companies. Its parent is Refco Group Ltd.

COUNTERSTATEMENT OF THE CASE

Congress stated clearly the standard for granting turnover of property to a foreign representative under § 304(b)(2). § 304(b)(2) provides that a court may turnover to a foreign representative of a foreign debtor's estate "the property *of* such estate, or the proceeds *of* such property . . ." (emphasis added). The prefatory clauses of § 304(b) provide that a foreign representative's turnover petition may be "controverted" by "a party in interest," including at "trial."[2]

Refco is *not*, as the Liquidator would have this Court believe, a creditor seeking unfairly to gain priority over other similarly situated creditors. Refco claims ownership of the *specific* property at issue and opposes the Liquidator's attempt to obtain a turnover of Refco's property so as to inflate the foreign debtor's estate. In distinguishing the unique facts of this case, the Second Circuit noted that Refco is not a prebankruptcy creditor that, without any ownership interest in specific assets claimed by the foreign debtor, rushed into a United States court to obtain an attachment of *any* property in an effort to improve its position at the expense of similarly situated creditors.

The Liquidator invoked § 304(b)(2) to obtain a turnover of approximately $11 million (the "Fund"), which is being held by the New York agent bank of the foreign debtor, Mebco. The Fund belongs to Refco. It represents currencies that Refco delivered *after* Mebco was put into liquidation and *after* the Liquidator was appointed. Refco delivered its currencies pursuant to prior agreements with Mebco *simultaneously* to exchange U.S. and foreign currencies. Refco performed its side of the agreements in the mistaken belief that Mebco was ready and able to perform, and without knowing that Mebco was put into liquidation between the time that the agreements were made and the time that the parties were to perform their simultaneous exchanges.

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[2] "Trial" means a trial on the merits. 124 Cong. Rec. 32,394 (1978).

Upon learning of Mebco's liquidation and non-performance of its side of the exchange agreements, Refco timely and properly exercised its rights under New York law to recover the Fund. Refco also commenced an action in New York federal court for the return of its money and a declaration that Mebco's agent bank is holding the Fund in constructive trust for Refco. Refco attached the Fund to insure its return.

The pertinent facts showing that the property in dispute belongs to Refco are set forth in the Second Circuit's decision. During the period from April 20, 1989, to 9:00 A.M. (EST) on April 27, 1989, Refco and Mebco entered into several agreements *simultaneously* to purchase currencies from, and sell currencies to, one another. Refco was to receive U.S. dollars from Mebco in exchange for foreign currencies, and Refco was to receive foreign currencies from Mebco in exchange for U.S. dollars. The agreed dates for these exchanges were April 27, 28, and May 2, 1989. The agreements were to be performed through Refco's New York office, with Citibank, N.A. ("Citibank"), in New York, acting for Refco. Mebco agreed that its deliveries and receipts of U.S. dollars would be transacted through Mebco's unaffiliated New York agent bank ("Swiss Bank-N.Y.").

On April 27, 1989, at 10:15 A.M. (EST), immediately after Refco and Mebco entered into the agreements, Swiss banking authorities placed Mebco into liquidation. Some forty-five minutes later, the authorities appointed the Liquidator. Later that day, Mebco's agent, Swiss Bank-N.Y., stopped all payments *out* of Mebco's account, but thereafter accepted transfers by Refco *into* Mebco's account.

Refco was not informed, and did not know, of Mebco's liquidation. Neither Mebco, nor the Liquidator, nor Swiss Bank-N.Y. informed Refco that (a) Mebco's financial condition had severely deteriorated from that which Mebco previously had represented to Refco, (b) Mebco was in liquidation, (c) Mebco would not perform its side of the simultaneous exchange agreements, or (d) Mebco's Swiss Bank-N.Y. account

remained open after liquidation to receive Refco's funds, but was frozen for payment of funds.[3]

Refco performed its side of the agreements after Mebco's liquidation began. From 3:46 P.M. (EST), on April 27, 1989, to May 2, 1989, Refco's New York bank delivered U.S. dollars to Mebco through Swiss Bank-N.Y., and foreign currencies to Mebco's accounts at banks abroad. But, unbeknownst to Refco at the time, Mebco failed simultaneously to deliver to Refco's Citibank accounts foreign currencies against U.S. dollars that Refco delivered to Swiss Bank-N.Y., or the U.S. dollars at Swiss Bank-N.Y. that were to have been delivered against Refco's transfer of foreign currencies.

On May 3, 1989, having learned that Mebco had not performed its side of the simultaneous currency exchanges, Refco called Mebco to ascertain why. Refco was told that Mebco's banking license had been revoked and that the Liquidator had been appointed. Refco thereupon demanded the immediate return of the currencies that Refco delivered as its part of the transactions that Mebco had not performed. Mebco and the Liquidator, however, failed and refused either to perform Mebco's side of the transactions or to return Refco's money. The total at issue is the Fund of approximately $11 million, plus interest, being held by Swiss Bank-N.Y.

The bankruptcy and district courts below failed to read § 304(b)(2) in accordance with its plain language and, as a consequence, ordered a turnover of Refco's property to the Liquidator. On May 5, 1989, Refco commenced an action against Mebco in the United States District Court for the Southern District of New York to recover the Fund and attached the Fund at Swiss Bank-N.Y. The Liquidator moved to dismiss Refco's complaint on the grounds of *forum non conveniens* and comity, so that Refco's money could be distributed to Mebco's creditors in Switzerland. The district

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[3] The statement in the Liquidator's petition for *certiorari*, that Refco performed "after the public announcement of Mebco's liquidation" (Pet. at 8), is misleading. The parties stipulated below that Refco does not subscribe to the newswire service that reported Mebco's liquidation.

court found that the parties and their performance of the agreements at issue had a substantial New York nexus, and denied the Liquidator's motion to dismiss for *forum non conveniens*. The court concluded that the question of ownership of the Fund should be decided in a § 304 turnover case and gave the Liquidator leave to bring such a case. 108 B.R. 29, 31 (S.D.N.Y. 1989).

In January 1990, the Liquidator filed a § 304 petition in the bankruptcy court for turnover of the Fund. Refco moved to dismiss the petition on the ground that the Fund belongs to Refco. Refco asserted that, since § 304(b)(2) expressly limits turnover to "property of" the foreign debtor's estate, the court could not turnover Refco's money to the Liquidator. The Liquidator moved for summary judgment, contending that (a) the words "property of such estate" in § 304(b)(2), which set the turnover standard, should be read as "property involved in such foreign proceeding," which is a clause in § 304(b)(1)(A)(i) that sets the injunctive relief standard, and (b) the Fund somehow is "involved in" Mebco's foreign proceeding. Refco filed a cross-motion for summary judgment based on the plain language of § 304(b)(2). Refco also disputed the Liquidator's assertion that the Fund is property "involved in" the Swiss proceeding.

The bankruptcy court rejected Refco's contention that, under § 304(b)(2), it should make a threshold determination of ownership of the Fund. 130 B.R. 705, 711 (Bankr. S.D.N.Y. 1991). The court refused to distinguish between the different standards that Congress set for turnover, in § 304(b)(2), and injunctive relief, in § 304(b)(1)(A)(i), and applied the injunctive relief standard to the turnover issue. The bankruptcy court held that, under Swiss law, Refco's Fund at Swiss Bank-N.Y. is "included in the property *involved in* Mebco's liquidation proceedings" and should be turned over to the Liquidator for disposition in the foreign liquidation proceeding. 130 B.R. at 712 (emphasis added). The bankruptcy court order was affirmed summarily by the district court, on the "opinion below." Pet. App. at 70a.

The Second Circuit reversed the lower courts and held that the plain language of § 304(b)(2) required the

bankruptcy court to determine Refco's claim of ownership of the property and that, under the facts here, the issue should be decided under New York law. The Second Circuit held that the clause allowing "turnover of the property of" the foreign debtor's estate requires that where, as here, "an adverse claimant raises a plausible dispute concerning the ownership of property whose turnover is sought by a foreign liquidator pursuant to § 304(b)(2), a court should resolve that threshold issue before ordering turnover." 961 F.2d 341, 348 (2d Cir. 1992). The court reasoned that "the use of the term 'property of such estate' presupposes an antecedent determination of property interests as a condition to the turnover of property to a foreign representative." *Id.*

The Second Circuit held that, for purposes of § 304, while the law of the jurisdiction in which the foreign proceeding is pending defines the *types* of property that comprise the foreign debtor's estate, other applicable law governing individual property rights absent bankruptcy determines whether the *particular* property at issue belongs to the debtor's estate or to an adverse claimant. 961 F.2d at 348.

In deciding whether the ownership dispute should be resolved under New York law or Swiss law, the Second Circuit reviewed the New York and Swiss contacts of the dispute and found that New York had the more significant contacts and, therefore, the greater interest in the dispute. Based on well-settled choice of law rules, the court held that New York law governs. *Id.* at 350-51.

REASONS FOR DENYING *CERTIORARI*

No other court of appeals has interpreted § 304(b)(2) and the Second Circuit decision does not depart from well-established law. The court reached the correct and fair result (a) by following this Court's repeated pronouncements that (i) statutory language must be construed in accordance with its plain meaning, and (ii) rights to specific disputed property should be determined by the law that governs absent bankruptcy, so that a debtor will not receive a windfall merely by reason of the happenstance of bankruptcy, and (b) by applying

well-settled choice of law rules to the particular facts of this case.

It is unlikely that a case such as this will arise again. It is doubtful that other foreign representatives will follow the lead of the Liquidator here and attempt to obtain a turnover of property known to belong to someone else.

1. This Court Should Not Grant *Certiorari* To Review The Second Circuit's Interpretation of § 304(b)(2) In Accordance With Its Plain Meaning.

§ 304(b)(2) provides that:

> [I]f a party in interest does not timely controvert the petition, or after trial, the court may - . . . (2) order turnover of the *property of such estate*, or the proceeds of such property, to such foreign representative; . . .

(emphasis added).

The Second Circuit held that the statutory language of § 304(b)(2) -- "property of such estate" -- limits a court's turnover power to property that belongs to the foreign debtor's estate. 961 F.2d at 348 ("[t]his interpretation of § 304(b)(2) is supported by the language of the statute"). Based on the statute's plain language, the court concluded that, where, as here, "an adverse claimant raises a plausible dispute concerning the ownership of property whose turnover is sought by a foreign liquidator pursuant to § 304(b)(2), a court should resolve that threshold issue before ordering turnover." *Id.*

The Second Circuit rejected the Liquidator's argument that § 304(b)(2) should be rewritten by replacing its words "property *of* such estate," relating to turnover, with the § 304(b)(1) words "property *involved in* such foreign proceeding," relating to injunctive relief. *Id.* at 349 (emphasis added). The court contrasted the turnover language of § 304(b)(2) with the injunctive relief language of § 304(b)(1):

> While § 304(b)(1) empowers a bankruptcy court to enjoin litigation "with respect to property involved in" a foreign insolvency proceeding, presumably "to

> prevent dismemberment by local creditors of assets located here," S. Rep. No. 989 at 35, § 304(b)(2) authorizes turnover only of "property of such estate, or proceeds of such property." *Thus, the use of the term "property of such estate" presupposes an antecedent determination of property interests as a condition to the turnover of property to a foreign representative.*

Id. at 348 (emphasis added). The court concluded that "Congress used different language" in the two subsections "and we are not at liberty to ignore this legislative choice." *Id.* at 349.

The Second Circuit's decision adheres to the fundamental tenet of statutory construction that statutory language is to be interpreted in accordance with its plain meaning. This Court has applied this principle of statutory construction to the Bankruptcy Code. *See, e.g., Patterson v. Shumate,* 112 S. Ct. 2242, 2246 (1992) ("the plain language of the Bankruptcy Code and ERISA is our determinant"); *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989) ("the sole function of the courts is to enforce [a statute] according to its terms"). This Court recently reiterated this principle unequivocally and without dissent: "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted).

Here, the statutory provisions that allow "a party in interest" to "controvert" a turnover petition and a court to "order turnover of the property of such estate" are clear and unambiguous statements by Congress that a court may order turnover only of property that belongs to the foreign debtor's estate, but not property that belongs to an adverse party.

The Second Circuit rejected the Liquidator's contention that property should be turned over under § 304(b)(2) so long as it fits within one of the *types* of property that assertedly comprise a debtor's estate under Swiss law:

> The applicable distinction is drawn in Lawrence P. King, 2 *Collier on Bankruptcy* ¶ 304.01, at 304-3 (15th ed. 1992) (emphasis added): "For purposes of section 304, the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending, *with other applicable law serving to define the estate's interest in particular property.*" *See also In re Lines*, 81 B.R. 267, 271 (Bankr. S.D.N.Y. 1988) (same).

961 F.2d at 348 (emphasis in original). The decision follows this Court's pronouncements that, whereas bankruptcy law defines an estate generically, other applicable law that governs individual property rights absent bankruptcy determines whether a debtor or an adverse party has a greater right to the specific property at issue, so as "to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Butner v. United States*, 440 U.S. 48, 55 (1979); *see also Barnhill v. Johnson*, 112 S. Ct. 1386, 1389 (1992) ("[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law").[4]

The Second Circuit disagreed with the Liquidator's argument that the court should turnover the Fund in dispute so that ownership could be determined in Mebco's Swiss liquidation proceeding:

> The power of the court extends to "property of [the] estate." § 304(b)(2). Once a plausible challenge is presented as to whether particular property falls within the statutory definition, the bankruptcy court whose authority is invoked must determine the legitimacy of that invocation. The nature of this determination demands that it be made prior to the turnover of the property. *It is unsatisfactory to say*

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[4] The Second Circuit's decision is consistent also with the holding in *In re Garrott & Sons*, 772 F.2d 462, 466 (8th Cir. 1985) (filing bankruptcy does not convert money held in debtor's bank account in constructive trust for another into property of the debtor's estate).

> *that the property should first be turned over, because it is the ascertainment that property is "of [the] estate" under local law that defines the extent of the court's power to issue the turnover order.*

961 F.2d at 349 (emphasis added).

Refco submits that, since the Second Circuit interpreted § 304(b)(2) in accordance with its plain language, the Liquidator's petition should be denied.

2. None Of The Liquidator's Arguments Supports A Departure From The Principle That § 304(b)(2) Is To Be Interpreted In Accordance With Its Plain Language.

The Liquidator's petition is premised on a mischaracterization of the Second Circuit's decision. The court did not hold that turnover under § 304(b)(2) "can only be granted as to assets which would be property of a domestic bankruptcy 'estate' under [Bankruptcy Code] § 541 . . ." (Pet. at 11, 14). To the contrary, the court stated clearly that, "'[f]or purposes of section 304, the estate of a foreign debtor is defined by the law of the jurisdiction in which the foreign proceeding is pending . . . .'" 961 F.2d at 348. The court held also that other applicable law that governs individual property rights absent bankruptcy determines whether the debtor's estate or an adverse party has a greater interest in the particular property at issue. *Id.* The court *thereafter* referred to § 541, 11 U.S.C. (1988 & Supp. II 1990), by way of "analogy" and as "further support" for the court's interpretation of the plain language of § 304(b)(2). 961 F.2d at 349. The court stated that, under § 541, "'[a]lthough federal bankruptcy law determines the outer boundary of what may constitute property of the estate, state law determines the 'nature of a debtor's interest' in a given item.'" *Id.* (citations omitted).

The Liquidator devotes a substantial part of its brief to rationalizing its assertion that the words "such estate" in § 304(b)(2) "can only be a short-hand reference to the original phrase 'property involved in such foreign proceeding' in 304(b)(1)(A)(i). . .," and that, therefore, both subsections 304(b)(2) and (b)(1)(A)(i) should be read as if they contain the phrase "property involved in such foreign proceeding," which

appears only in § 304(b)(1)(A)(i) (Pet. at 16). This argument completely ignores the limiting words "property *of*," which immediately precede the words "such estate" in § 304(b)(2), and overlooks the fact that Congress used the word "of" twice in § 304(b)(2) to modify and define the word "property:" "turnover of the property *of* such estate, or the proceeds *of* such property. . . ."

The suggested tortured parsing of § 304(b)(2) would require that the statutory word "of" be deleted from that subsection and replaced with the words "involved in," and that the words "such estate" be replaced by the words "such foreign proceeding." These proposed deletions and replacements of statutory provisions are impermissible. "[T]he settled rule [is] that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (interpreting Bankruptcy Code § 106); *see also Freytag v. C.I.R.*, 111 S. Ct. 2631, 2638 (1991) (expressing "'a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment'").

Moreover, the attempt to ascribe the same meaning to the different limiting language used in the injunction provision of § 304(b)(1)(A)(i) and the turnover provision of § 304(b)(2) violates this Court's command that:

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." . . . "The short answer is that Congress did not write the statute that way." We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.

Russello v. United States, 464 U.S. 16, 23 (1983) (citations omitted). Here, too, had Congress intended to empower a bankruptcy court to order turnover of "property involved in the foreign debtor's proceeding," Congress would have expressly

done so. Instead, Congress chose to use that language only in the subsection relating to injunctive relief.

The Liquidator protests that it is illogical to hold that a court may issue injunctions, pursuant to § 304(b)(1), with respect to property "involved in" the foreign proceeding, without prior determination of ownership, but may not order turnover of property, pursuant to § 304(b)(2), unless the court first determines that it is "property of" the foreign debtor's estate (Pet. at 17-18). But, as the Second Circuit held: "Congress used different language in § 304(b)(1) and (2), the two provisions perform different functions, and we are not at liberty to ignore this legislative choice." 961 F.2d at 349. That the injunction provisions of § 304(b)(1) perform a different function is clear from (a) statements by bankruptcy courts that the provisions of § 304(b)(1) make available in a § 304 case the same stay that is available in domestic bankruptcy cases by virtue of Bankruptcy Code § 362, 11 U.S.C. (1988 & Supp. II 1990) (*see, e.g., In re Kingscroft Ins. Co., Ltd.*, 138 B.R. 121, 126 (Bankr. S.D. Fla. 1992); *In re Banco Nacional de Obras Y Servicios Publicos, S.N.C.*, 91 B.R. 661, 664 (Bankr. S.D.N.Y. 1988)), and (b) this Court's holding that a preliminary injunction preserves the status quo until a trial on the merits and "a party thus is not required to prove his case in full at a preliminary-injunction hearing" (*University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)).[5]

The Liquidator's arguments based on legislative history fail to satisfy its "'exceptionally heavy' burden of persua[sion]" that Congress did not intend § 304(b)(2) to be read in accordance with its plain meaning. *See Patterson*, 112 S. Ct. at 2248. The scant legislative history of § 304, to which the Liquidator refers (Pet. at 14), was considered by the Second Circuit (961 F.2d at 348) and does not address the plain words of § 304(b)(2) which limit turnover to property belonging to the foreign debtor's estate. The Liquidator's reliance on the

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[5] It is farfetched, at best, for the Liquidator to suggest (Pet. at 17-18) that a court would deny turnover to a foreign representative because the property belongs to an adverse claimant, and would permanently enjoin the adverse claimant from taking steps to recover its property.

legislative history of Bankruptcy Code § 306, 11 U.S.C. (1988), to interpret § 304 (Pet. at 17), is equally frivolous. § 306 is a "[l]imited appearance" statute which provides that filing a § 304 petition does not subject the foreign representative to jurisdiction for purposes *other than* determinations of disputes under § 304.

In an attempt to write § 304(b)(2) out of the statute, the Liquidator argues that the central focus of § 304 is comity, which is mentioned in § 304(c)(5), and that the only real issue for a bankruptcy court on a turnover petition is under § 305(c), *i.e.*, whether "American creditors will receive due process in the foreign tribunal" (Pet. at 13, 18). That argument, however, totally ignores the fact that Congress chose to put in § 304(b) the right of a "party in interest" to "controvert the petition," including at "trial." The plain language of § 304(b) shows that a court may not consider any of the factors in § 304(c), including comity, unless it has determined that the conditions of § 304(b) have been satisfied. Only if the court determines that the conditions of § 304(b) have been satisfied, and therefore the relief provided therein is *available*, may the court apply the § 304(c) criteria to determine whether it is *appropriate* to grant the relief requested.

Furthermore, the legislative history shows that comity was added as one of the six factors listed in § 304(c) to make clear that comity is to be considered "in addition to the other factors. . . ." 124 Cong. Rec. 32,394 (1978). As one commentary put it: "Comity is not shorthand for turnover." Morales and Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 Bus. Law. 1573, 1594 (1989).

The Liquidator is being illogical in yet another respect. On the one hand, it recognizes that on a § 304 turnover petition a bankruptcy court must hold a hearing to determine whether the criteria set forth in § 304(c) have been satisfied (Pet. at 18). On the other hand, the Liquidator contends that it would controvert the purpose of § 304 and be dilatory for the court to hear and determine whether the subject property actually belongs to the foreign debtor (Pet. at 11, 20 n.3). If the Second Circuit had accepted the Liquidator's proposition, it would have

led to the absurd result that disputed property would be turned over unquestioningly every time a foreign representative asserts that the property "is part of the property being administered abroad," without regard to who possesses or owns the property (Pet. at 18). The Liquidator illustrated the absurdity of its position at oral argument before the Second Circuit. The Liquidator was asked if funds stolen from Refco by a representative of Mebco and deposited in Mebco's account at Swiss Bank-N.Y. would be subject to turnover for disposition in Switzerland. The Liquidator answered "yes."

Also frivolous is the assertion that the Second Circuit decision will "complicate[ ] efforts of foreign representatives to marshall assets in a single forum . . ." (Pet. at 12). The Liquidator's right to marshall the foreign debtor's *assets* is not a license to grab property that belongs to someone else: "A determination that the funds are not property of the estate therefore does not improperly affect other creditors of the estate, because they have valid claims only against the estate's bona fide assets." 961 F.2d at 349. Nor will the Second Circuit's decision "reward fast moving domestic creditors" (Pet. at 11):

> [Refco's] position is that Mebco does not own the Disputed Funds. . . . The situation is clearly distinguishable from an effort by a normal bankruptcy creditor, without any plausible ownership claim to a specific asset, to gain a preferred position vis-a-vis other creditors by initiating a separate legal proceeding. *Cf. Victrix*, 825 F.2d at 714 (refusal to countenance attachment designed to evade writ of Swedish bankruptcy court); *Cunard*, 773 F.2d at 456 (same).

961 F.2d at 349-50.

The Liquidator's argument that *certiorari* should be granted because of an alleged "rising tide of transnational bankruptcies" (Pet. at 12) is rebutted by its own statistics. They show that an average of only fifteen § 304 petitions have been filed throughout the United States in each of the last five years. Moreover, the Liquidator does not argue that any of

these few petitions involved, as here, a party opposing turnover on the ground that it owns the property.

3. This Court Should Not Grant *Certiorari* To Review The Second Circuit's Factual Determination, Pursuant to Well-Settled Choice of Law Principles, That New York Law Decides Refco's Right To The Disputed Property.

The Second Circuit applied New York law to determine ownership of the Fund at issue based on the well-settled rule that the law of the jurisdiction having the greatest interest in the dispute will govern. *See Wells Fargo Asia Ltd. v. Citibank, N.A.*, 936 F.2d 723 (2d Cir. 1991), *cert. denied*, 120 L. Ed. 2d 868 (1992). The Liquidator acknowledges that the Second Circuit applied the correct conflicts rule, but contends that the particular facts of the case warrant the conclusion that Switzerland, rather than New York, has the greatest interest in the dispute over the Fund (Pet. at 20-21).

The Second Circuit's decision that "New York has a superior interest in the particular question at issue here" is fully supported by the record. 961 F.2d at 351. It shows that: The Fund is located in New York. Refco is a New York corporation with its principal place of business in New York. Refco performed its side of the currency exchange agreements in New York. Refco's confirmations of each of the transactions were prepared in, and sent to Mebco from, New York. Mebco agreed to pay U.S. currency to Refco, and to receive U.S. currency from Refco, through Swiss Bank-N.Y. Mebco so instructed Swiss Bank-N.Y. by telefacsimiles sent directly to Swiss Bank-N.Y. *Id.*

Furthermore, it is fundamental that the Supreme Court's judicial resources should not be exercised to review factual findings. *See New York Dock Co. v. S.S. Poznan*, 274 U.S. 117 (1927); *Boehmer v. Penn. R.R. Co.*, 252 U.S. 496 (1920).

CONCLUSION

For all the foregoing reasons, *certiorari* should be denied.

Respectfully submitted,

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